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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1284

JOHN S. EDMUNDS,

Petitioner,

—v.—

ROBERT WON BAE CHANG,
Judge, First Circuit Court,
State of Hawaii,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

Page

Opinions Below 2

Jurisdiction 2

Question Presented 2

Constitutional Provision and Statutes Involved 2

Statement of the Case 3

Reasons for Granting the Writ 7

1. The Decision Below Has Decided An Important Question Regarding The Scope Of Federal Habeas Corpus Relief In A Way In Conflict With Applicable Decisions Of This Court 7

2. Certiorari Should Be Granted Because The Decision Below Is In Conflict With Decisions Of The Fourth And Second Circuits 13

Conclusion 16

Appendices:

Opinion of the United States Court of Appeals for the Ninth Circuit 1a

Opinion of the United States District Court for the District of Hawaii 8a

Page

Memorandum Decision of the
United States Court of Appeals
for the Fourth Circuit 26a

TABLE OF AUTHORITIES

Cases	Page
Braden v. Kentucky, 410 U.S. 484 (1973)	8, 10
In Re Butts, 493 F.2d 842 (5th Cir. 1974)	11, 12
Carafas v. LaVallee, 391 U.S. 234 (1968)	8
Feliciano v. Laird, 426 F.2d 424 (2nd Cir. 1970)	11
Hensley v. Municipal Court, 411 U.S. 345 (1973)	8, 10
Jones v. Cunningham, 371 U.S. 236 (1963)	7
Jones v. United States, ___ U.S. ___, 42 L.Ed.2d 150 (1974)	12
Kauffman v. Secretary of the Air Force, 415 F.2d 991 (D.C. Cir. 1969)	12
Maness v. Meyers, ___ U.S. ___, 42 L.Ed 2d 574 (1975)	8, 9
Peyton v. Rowe, 391 U.S. 54 (1968)	8
State of Hawaii v. James Pokini, et al., Cr. No. 44262 (Circuit Court of the First Circuit, State of Hawaii)	3
Strait v. Laird, 406 U.S. 341 (1972)	8

Cases — Page

Thames v. Justices of Superior Court, 383 F.Supp. 41 (D. Mass. 1974) 15

Thistlethwaite v. City of New York, 497 F.2d 339 (2nd Cir.), cert. den., ___ U.S. ___, 43 L.W. 3359 (Dec. 23, 1974) 13, 15

United States ex rel. Horelick v. Criminal Court, 507 F.2d 37 (2nd Cir. 1974) 13, 14

United States ex rel. Radich v. Criminal Court, 385 F.Supp. 165 (S.D.N.Y. 1974) 10, 15

Walker v. Dillard, ___ F.2d ___, No. 73-1108 (4th Cir. June 20, 1973) 11, 13

Walker v. Dillard, 353 F.Supp. 566 (W.D. Va. 1972) 13

Statutes and Bills

28 U.S.C. §1254(1) 2

28 U.S.C. §2241 2

28 U.S.C. §2254 2

28 U.S.C. §2254(a) 7

Hawaii Penal Code §1077 5

Act 9, Session Laws of Hawaii, 1972 5

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. .....

JOHN S. EDMUNDS,

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-v.-

ROBERT WON BAE CHANG,
Judge, First Circuit Court,
State of Hawaii,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 2, 1975.

OPINIONS BELOW

The judgment of the Court of Appeals reversing the decision of the district court is reported at 509 F.2d 39 and is set forth in the Appendix, infra, pp. 1a - 7a. The opinion of the district court granting habeas corpus relief is reported at 365 F.Supp. 941 and is set out in the Appendix, infra, pp. 8a - 25a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 2, 1975. On April 10, 1975, Mr. Justice Brennan signed an order extending the time to file this petition up to and including April 12, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. Whether the imposition of a fine as a sentence for criminal contempt without an additional sentence to confinement is insufficient to constitute "custody" within the meaning of the federal habeas corpus statutes, 28 U.S.C. §§2241 and 2254.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the Fifth and Sixth Amendments to the Constitution of the United States and Chapter 153 of Title 28, United States Code (28 U.S.C.§§2241, 2254).

STATEMENT OF THE CASE 1/

On January 23, 1973, petitioner, an attorney, was representing a defendant in a state criminal trial 2/ in which the respondent was judge. As court opened, the following colloquy between petitioner and respondent occurred (App., infra, pp. 16a - 17a):

"BAILIFF: The Court of the Honorable Robert Won Bae Chang is now in session. Please be seated.

THE COURT: Please be seated.

MR. EDMUNDS: Your Honor, --

THE COURT: Please be seated.

MR. EDMUNDS: Your Honor, I have an --

THE COURT: Please be seated, Mr. Edmunds.

MR. EDMUNDS: -- issue I would like to raise.

THE COURT: The Court orders you to be seated, Mr. Edmunds.

MR. EDMUNDS: Your Honor, I'd like the record --

1/ The statement of the case is taken substantially from the opinions below.

2/ State of Hawaii v. James Pokini, et al., Cr. No. 44262 (Circuit Court of the First Circuit, State of Hawaii).

> THE COURT: If you do not be seated right now, Mr. Edmunds, the Court will find you in contempt of Court.
>
> MR. EDMUNDS: May I approach the bench, your Honor?
>
> THE COURT: You are found in contempt of Court, Mr. Edmunds. The Court will stand at recess."

It is undisputed that at all times petitioner spoke in a "low and courteous tone." App., infra, p. 24a. Furthermore, the Court below observed (App., infra, p.5a):

> "Of the six judges who have reviewed the facts claimed to constitute the contempt (the district judge and five justices of the Hawaii Supreme Court), three held the conduct contemptuous and three held it was not. Were we to reach the merits here, we might have considerable difficulty labelling the determination of the district court (that the conduct was not contemptuous) clearly erroneous."

Later, on the day of the twenty-third, petitioner was served with an order holding him in criminal contempt and directing him to pay a fine of twenty-five dollars within forty-eight hours. The judgment contained no sentence to confinement. Before the expiration of that time, petitioner moved respondent to reconsider his judgment. No action was ever taken on that motion. App., infra, p.10a. On January 29, 1973, petitioner was ordered to appear before respondent four days later to show cause why he should not be held in further contempt for failure to comply with the original contempt order. Petitioner

then sought a writ of prohibition from the Hawaii Supreme Court.3/ That court restrained respondent from proceeding further while it considered the writ. When the Hawaii Supreme Court denied the writ 4/ petitioner applied to the United States District Court for the District of Hawaii for a writ of habeas corpus to review the lawfulness of the contempt. The district court issued a restraining order against respondent and ultimately issued the writ. Respondent appealed to the United States Court of Appeals for the Ninth Circuit which reversed the district court on the jurisdictional question which is presented here for review:

> "The primary question on this appeal is whether a person against whom a fine has been imposed by a state court is "in custody" within the meaning of the federal habeas corpus statute, 28 U.S.C. §§2241, 2254. The district

---

3/ There is no direct appellate review of criminal contempt sentences under Hawaii state court procedure. See, Hawaii Penal Code §1077(5); Act 9, Session Laws of Hawaii, 1972.

4/ The 3-2 decision of the Hawaii Supreme Court denying the writ of prohibition is reported at 54 Hawaii Rep. ___, 512 P.2d 3 (1973). There is no question that petitioner has exhausted his state remedies. App., infra, p.11a.

court, concluding that he is, proceeded to the merits of petitioner Edmunds' claim and granted a writ. 365 F.Supp. 941 (D. Hawaii 1973). We disagree on the jurisdictional question and, accordingly, reverse." App., infra, pp. 1a -2a.

"...we conclude that there is insufficient "custody" present for the invocation of habeas corpus relief; the claimed restraints on Edmunds' liberty are neither severe nor immediate enough to justify the remedy." App., infra, p. 3a.

"We trust that whatever Congress meant by the word "custody" when it enacted the habeas corpus statute, it did not intend to authorize federal intervention into state judicial proceedings to review a "fine only" sentence. The custody requirement exists to distinguish between "severe restraints on individual liberty" and those which are not severe. If the latter category does indeed exist, we are clear that a "fine only" sentence falls within it." App., infra, p. 6a. (footnotes omitted).

Execution of the state court judgment has been restrained by a series of orders from the various courts involved, the last order being a stay of mandate issued by the Court below on March 4, 1975.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Has Decided An Important Question Regarding The Scope Of Federal Habeas Corpus Relief In A Way In Conflict With Applicable Decisions Of This Court.

If permitted to stand, the decision will severely contract the scope of federal habeas corpus. It will mean that a state court determination of important federal questions adverse to a defendant will be immune from any judicial review in a federal forum except possibly by certiorari or appellante jurisdiction in this Court following the conclusion of state court appellate remedies. Under the decision below, federal habeas corpus does not lie to review a federal constitutional claim where a defendant was sentenced only to a fine irrespective of the egregiousness of the constitutional error committed by the state court.

28 U.S.C. §2254(a) provides that the writ of habeas corpus is available to:

> "...a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

As this Court observed in Jones v. Cunningham, 371 U.S. 236, 288 (1963), construing this statute, it

> "...does not attempt to mark the boundaries of 'custody' nor in any way other than the use of that word

> to limit the situations in which the writ can be used."

The decision below, in sanctioning less, represents a retreat from the increasingly expanded interpretation which this Court has afforded the reach of the Great Writ. See, e.g., Peyton v. Rowe, 391 U.S. 54 (1968); Carafas v. LaVallee, 391 U.S. 234 (1968); Strait v. Laird, 406 U.S. 341 (1972); Braden v. Kentucky, 410 U.S. 484 (1973); Hensley v. Municipal Court, 411 U.S. 345 (1973).

The decision below also is at odds with the attitude expressed by this Court in Maness v. Meyers, ___ U.S. ___, 42 L.Ed.2d 574 (1975), decided after the decision below.

Maness was one of two attorneys held in contempt for misconduct: "(T)he court held petitioner [Maness] and his co-counsel [Maley] in contempt, as well as their client, and fixed punishment for each of them..." 42 L.Ed.2d at 581. Then:

> Pursuant to Texas Procedure the citation of the attorneys was reviewed by another state district judge, the respondent here, Judge Amos R. Meyers ...The court noted that it felt that the record supported a finding beyond a reasonable doubt...and as noted above, affirmed a finding of contempt ...but changed the original penalty to a fine-only sentence.

Id. at 582.

Following exhaustion of state court remedies, Maness filed a petition for a writ of

certiorari in this Court, but Maley, like petitioner here, sought federal habeas corpus which was granted by the district court. The Chief Justice then noted in Maness (Id. at 583):

> "An appeal has been filed from that judgment and is now pending before the United States Court of Appeals for the Fifth Circuit. On April 15, 1974, we granted the petition for a writ of certiorari; we are advised that the case is being held pending our decision in this case."

The decision in Maness thus implicitly recognized the propriety of the grant of the habeas corpus writ by the Texas federal court to Maley. The Chief Justice explicitly recognized the fact that the sentence imposed on both attorney-contemnors was "...a $500 fine with no confinement." Id. at 582.

Furthermore, the unique circumstances of an attorney's conviction for criminal contempt, whether a jail sentence is imposed or not, carry with it sufficiently unique restraints on the attorney's liberty to entitle an attorney to habeas corpus standing.

As the district court recognized, petitioner's criminal contempt conviction subjects him to disabilities and restraints far more serious than the loss of $25.00:

> It is not merely the original contempt citation which is before this court; Edmunds has been ordered to show cause why he should not be held in further contempt for failing to pay the fine imposed upon him. The consequences of the pending action

> could be grave. An attorney's reputation is his principal professional asset; the success of his efforts often depends upon a delicate balance of harmony with the courts. A judgment of criminal contempt is something far more than a mere "normal restraint" to one who occupies the status of an officer of the court. Moreover, under Hawaii law there is at least the potential for disciplinary action being taken against an attorney who is found in contempt. 365 F.Supp. at 944(a). 5/

The court below found these concerns to be too speculative to constitute "custody." But they are no less speculative than those restraints where the custody requirement was satisfied by e.g., the option of paying a fine in lieu of incarceration. See, United States ex rel., Radich v. Criminal Court, 385 F.Supp. 165, 169 n.4 (S.D.N.Y. 1974).

Like the petitioner in Hensley v. Municipal Court, supra, petitioner:

> "...has been forced to fend off the state authorities by means of a stay, and those authorities retain the determination and the power to seize him as soon as the obstacle of the stay is removed. The need to keep the stay in force is itself an unusual and substantial impairment of his liberty." 411 U.S. at 352.

5/ In this respect, respondent's order to petitioner to show cause why he should not be held in further contempt acts as the functional equivalent of a detainer. See, Braden v.

Like Hensley, petitioner:

> "...cannot come and go as he pleases. His freedom of movement rests in the hands of state judicial officers, who may demand his presence at any time and without a moment's notice. Disobedience is itself a criminal offense. The restraint on liberty is surely no less severe than the conditions imposed on the unattached reserve officer whom we held to be 'in custody' in Strait v. Laird, supra." 411 U.S. at 351.

See also, Walker v. Dillard, ___F.2d ___, No. 73-1108 (4th Cir. 1973) p.3, slip opinion (copy in Appendix at 26a-30a). And, it seems to us obvious that the damage to an attorney's professional reputation caused by a conviction for criminal contempt is a disability or restraint sufficient to confer habeas jurisdiction on the District Court. Cf. In Re Butts, 493 F.2d 842, 844 (5th Cir. 1974). 6/

5/ (continued)
Kentucky, supra at 488-489. See also, Feliciano v. Laird, 426 F.2d 424, 427 n.4 (2nd Cir. 1970).

6/ "Conviction for contempt of court could also have serious adverse career consequences ... His conviction could provide a basis for disciplinary action by a bar association. Opportunities for appointment to the bench or to other high office might be foreclosed as a result of this blot upon his record. The conviction might damage [his] reputation in the legal community, and this in turn might affect his ability to attract clients and represent

As observed by former Senior Circuit Judge Edgerton, in a closely related context in Kauffman v. Secretary of the Air Force, 415 F.2d 991, 996 (D.C. Cir. 1969):

> "The writ of habeas corpus has played a unique role in the system by affording the basis for ultimate Supreme Court review of constitutional errors ...To hold that collateral review is contingent on confinement in every case would arbitrarily condition... access to... review of constitutional errors upon a factor unrelated to the gravity of the offense..."

Accord, Jones v. United States, ___ U.S. ___, 42 L.Ed.2d 150, 152 (1974) (Douglas, J., dissenting).

The decision below having decided an important federal question in a manner in conflict with decisions of this Court, certiorari should be granted.

6/ (continued)
them effectively, especially in open court. In light of these possible collateral consequences [his] appeal is not 'abstract, feigned or hypothetical' so as to justify dismissal..." Butts, supra at 844.

II. Certiorari Should Be Granted Because The Decision Below Is In Conflict With Decisions Of The Fourth And Second Circuits.

Both the Fourth and Second Circuits permit federal habeas corpus review of state court criminal convictions in which a sentence imposed is effectively a "fine only sentence." Walker v. Dillard, ___ F.2d ___, No. 73-1108 (4th Cir. June 30, 1973) (a copy of the court's unreported opinion is set forth in the Appendix at 26a - 30a); United States ex rel., Horelick v. Criminal Court, 507 F.2d 37 (2nd Cir. 1974); Thistlethwaite v. City of New York, 497 F.2d 339 (2nd Cir. 1974), cert. den. ___ U.S. ___, 43 L.W. 3359 (Dec. 23, 1974); United States ex rel., Radich v. Criminal Court, 385 F.Supp. 165 (S.D.N.Y. 1974).

In Walker v. Dillard, supra, the petitioner sought federal habeas corpus review of a misdemeanor conviction rendered by a Virginia municipal court in which she "was sentenced to serve thirty days in jail and to pay a twenty-five dollar fine and costs. The jail term was suspended for six months." App., infra, p. 27a. The district court dismissed the petition on the ground that "a thirty day suspended sentence and a twenty-five dollar fine ...is not a sufficient 'restraint' to put the petitioner 'in custody' within the meaning of the habeas corpus statutes..." Walker v. Dillard, 353 F.Supp. 566, 570 (W.D. Va. 1972). On appeal the Fourth Circuit reversed. ___ F.2d ___. The court found that the possibility of a future restraint occasioned by possible activation of the suspended portion of the sentence for "any factor which the judge considers sufficient" was a restraint constituting

custody for federal habeas corpus purposes:

> "We think the rationale of Carafas and Hensley applies to the circumstances of this case. Even though at the time she filed the petition in the district court Walker was not incarcerated, time did remain on her suspended sentence. Under Virginia law the trial court clearly had the power to activate the thirty day sentence "for any cause deemed by it sufficient." Va.Code Ann. §53-275; Barry v. Commonwealth, 200 Va. 495, 106 S.E.2d 593 (1959). It is inconceivable that there are any significant differences in "restraints" on a man's liberty when he is released on bail, see Hensley, supra, than when he is released on a suspended sentence. In both situations a violation of any factor which the judge considers sufficient, subjects the defendant to incarceration. This is as much of a "restraint" on liberty as parole or probation. See Carafas v. LaVallee, supra; Walker v. North Carolina, 262 F.Supp. 102 (W.D.N.C. 1966), aff'd. on other grounds 372 F.2d 129 (4th Cir. 1967)." (App., infra, p. 29a).

There is no functional difference between the possible activation of Mary Walker's suspended sentence and the future proceedings envisioned by respondent's order to show cause directed to the petitioner here.

Similarly, the Second Circuit has consistently permitted review of sentences in which payment of a fine could be made in lieu of incarceration. In United States ex rel., Horelick v. Criminal Court, supra, the

petitioner had been sentenced on each of two counts "to pay a fine of $250 or serve 30 days in jail," 507 F.2d at 38 (emphasis added). The district court, in granting relief, 366 F.Supp. 1140, found the pendancy of such a sentence sufficient to constitute custody. The Second Circuit, although reversing on the merits, impliedly affirmed the district court's jurisdictional holding. And, in Thistlethwaite v. City of New York, supra, the appellants had been convicted in a state court and sentenced to pay a $10 fine or spend two days in jail. They paid the fine. In rejecting their suit brought under 42 U.S.C. §1983 to attack the statute under which they were convicted, the Second Circuit observed that "habeas corpus is generally available in situations similar to the one at hand." 497 F.2d at 343. See e.g., United States ex rel., Radich v. Criminal Court, supra at 167-168 & n.4 ("He was sentenced to pay a $500 fine or serve sixty days...") (emphasis added). See also, Thames v. Justices of Superior Court, 383 F.Supp. 41, 43 (D. Mass. 1974).

It seems clear that under either theory of custody which we have advanced in Point I, supra, that is, the "collateral consequences" which flow from a contempt citation or the actual restraints imposed upon petitioner by the judgment of contempt and the pendancy of the show cause proceedings, petitioner would have been afforded recognition of habeas jurisdiction in either the Fourth or Second Circuit.

Certiorari should therefore be granted to resolve this conflict.

CONCLUSION

For all of the foregoing reasons, the petition for certiorari should be granted and the decision below reversed.

Respectfully submitted,

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April 1975